

EXHIBIT B

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 ASI, INC.,

4 Plaintiff, New York, N.Y.

5 v. 16 MC. 269-P1

6 HSBC BANK (USA), N.A.,

7 Defendant.

8 -----x

9 August 30, 2016
10 11:40 a.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,
13 District Judge

14 APPEARANCES

15
16 WEISBROD, MATTEIS & COPLEY, PLLC
17 Attorneys for Plaintiff
18 BY: SHELLI L. CALLAND
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20 GREENBERG TRAURIG, LLP
21 Attorneys for Defendant
22 BY: LOUIS SMITH
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1 (Case called)

2 MS. CALLAND: Shelli Calland and Stephen Weisbrod,
3 from Weisbrod, Matteis & Copley, for movant, ASI, Inc.

4 THE COURT: Very good. Good morning.

5 MS. CALLAND: Good morning.

6 MR. SMITH: Good morning, your Honor. Louis Smith,
7 Greenberg Traurig, appearing on behalf of HSBC Bank U.S.A.,
8 N.A.

9 MR. VAN NOSTRAND: Aaron Van Nostrand, from Greenberg
10 Traurig, also on behalf of HSBC Bank U.S.A. N.A.

11 THE COURT: Okay. Very good. Good morning to you.

12 I am hearing this case in my capacity as Part I judge.
13 I have carefully read everyone's papers. I am happy to hear
14 brief argument from each side, beginning with ASI.

15 MS. CALLAND: Thank you, your Honor.

16 Aviva has presented ample evidence that HSBC U.S.A.
17 has control over documents held by its overseas affiliates:

18 First, HSBC U.S.A. admitted in its deferred
19 prosecution agreement with the federal government that it can
20 procure information in the possession of its foreign affiliates
21 and that it in fact has procured information in the possession
22 of its foreign affiliates.

23 THE COURT: Wait a minute. The deferred prosecution
24 agreement is a one-time negotiated agreement. Just because it
25 was in the broader interests of the HSBC universe to enter into

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1 that agreement with DOJ limited to prosecutions and
2 investigations, why does that mean that one prong of HSBC, in a
3 completely different context, can get at the information that
4 is most directly held by another? Why are these the same
5 issue?

6 MS. CALLAND: Well, your Honor, so, first of all,
7 before it even entered into the DPA, it was HSBC U.S.A.
8 specifically, so not HSBC Holdings, the parent company, or the
9 HSBC Group in general, but HSBC U.S.A. that produced over 9
10 million pages of documents to the federal government.

11 THE COURT: But in the context of a criminal
12 investigation, the incentive structure is completely different,
13 and people may -- an affiliate, for example, may willingly
14 collaborate or cooperate and produce materials ultimately
15 destined for a federal regulator for the reason that any
16 commercial entity has an incentive to cooperate with a criminal
17 investigation, which is to cooperate and avoid indictment. It
18 is a completely different situation than in the civil. In
19 other words, the fact of the events involving the production of
20 documents in the DPA say to me that there was an incentive in
21 the context of a criminal case to produce materials. It
22 doesn't mean that the subpoenaed entity had the power to go and
23 get the materials in the possession of an affiliate. It is a
24 completely different paradigm.

25 MS. CALLAND: It is true that it is criminal

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1 litigation, rather than civil litigation, but it is still
2 litigation. And so the Hunter Douglas case, I think, is
3 actually an excellent example here. This is exactly the
4 situation that the court was referring to in the Hunter Douglas
5 case, when it said that if a company can obtain documents from
6 an affiliate to assist itself in litigation, then it must
7 produce them for discovery purposes.

8 So, in Hunter Douglas, counsel for the subpoenaed U.S.
9 entity stated that if its foreign affiliate -- in that case it
10 was its parent company -- were the subject of a government
11 investigation in the United States and documents were sought
12 here, that the U.S. entity could cause its foreign affiliate to
13 produce the documents under those circumstances.

14 THE COURT: They have not said that here, though.
15 HSBC hasn't said that. You have here a different situation,
16 where there was, involving different facts altogether, a DPA,
17 but HSBC has made no such statement in this case.

18 MS. CALLAND: Well, in Hunter Douglas it was a
19 hypothetical question that was asked in the context of that
20 subpoena. But here it is not just a hypothetical. It is an
21 actual situation, where there is a government investigation and
22 HSBC U.S.A. produced documents that were in the possession of
23 its foreign affiliates and promised that it could do so in the
24 future as well.

25 THE COURT: It said in the DPA it basically committed

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1 to making materials available in the event of a prosecution or
2 investigation of officers or employees. That's not this case.
3 In other words, the affiliate has agreed to do that and, no
4 doubt, that helped ward off prosecution for HSBC. But why does
5 that benefit you in unrelated civil litigation? I am just not
6 following the inference from the DPA.

7 MS. CALLAND: I think that the idea is, so, it is not
8 like we are trying to stand in the shoes of the federal
9 government or anything like that. But we are using the DPA as
10 evidence that HSBC U.S.A. under some circumstances can actually
11 obtain documents, it has the practical ability to obtain
12 documents from its foreign affiliates.

13 THE COURT: But the effect of that would mean that any
14 time an entity that's part of a worldwide umbrella agrees, as
15 part of a DPA, to produce documents outside of its own pod to
16 the government, that's going to come back and slap them in the
17 face in unrelated civil litigation where the argument will be
18 made, ah-ha, there are really no barriers among the different
19 parts of the corporate tree; you, HSBC, need to be treated as
20 having access to everything. There is an inference in there
21 that is very speculative.

22 MS. CALLAND: So the question here, right, is whether
23 or not there is a barrier to HSBC U.S.A. obtaining the
24 documents from its foreign affiliates. The incentives as to
25 why it is --

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1 THE COURT: No. The issue is whether there is the
2 practical ability of HSBC to go and get it. It is one thing to
3 say there is a practical ability to go and get it when HSBC
4 calls up its foreign affiliate and says, We're going to get
5 indicted unless our foreign affiliates don't snap to. Under
6 those circumstances maybe there is a practical ability because
7 the foreign affiliate has an overwhelming interest in HSBC's
8 not getting indicted and being put out of business. No
9 disrespect to ASI, but you can't threaten prosecution, and
10 there is absolutely no reason to think that the foreign
11 affiliate would come to heel if HSBC were to simply call and
12 say, Please.

13 MS. CALLAND: In this case, HSBC U.S.A. hasn't even
14 asked its parent company or its affiliate to produce the
15 documents, so we don't know what they would say. There is no
16 evidence in the declarations that were provided --

17 THE COURT: But the burden is yours.

18 MS. CALLAND: It is. Which is why there is the
19 evidence in the form of the DPA and there is also evidence in
20 the form of the statements on HSBC U.S.A.'s Web site that talk
21 about the seamless international network of HSBC banks that
22 they have created, if I can turn to that for a moment.

23 There are numerous examples that we provided in our
24 reply brief of statements on HSBC U.S.A.'s Web site about how
25 the HSBC U.S.A. and its foreign counterparts have created a

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1 seamless banking system where information flows freely among
2 all of the HSBC banks, and that idea really permeates HSBC
3 U.S.A.'s Web site. So HSBC U.S.A.'s customers can use one
4 single log-on to access and move funds between all of their
5 HSBC accounts all around the world.

6 THE COURT: But does that mean that HSBC can gain
7 access to documents held by an affiliate or does it mean that a
8 customer can use a one-stop shop to obtain the customer's own
9 records?

10 MS. CALLAND: I think that HSBC U.S.A. has been
11 calling this a customer-facing system. But the reality is
12 that if there is a customer-facing system that there needs to
13 be a part of that system that faces the company or else the
14 company wouldn't be able to assist the customer with that
15 service.

16 THE COURT: What do you mean by the company, though?
17 Why do we assume that it is HSBC that would be the one that
18 would assist the customer if the customer was, let's say,
19 having technical problems accessing its worldwide records?

20 MS. CALLAND: It is an HSBC system, so I think it is a
21 service that is provided by HSBC and it is advertised on the
22 HSBC U.S.A. Web site. In other words, the HSBC -- a customer
23 HSBC U.S. account is linked up with its HSBC Hong Kong account
24 and if that's visible to the customer and available to the
25 customer, it also must be visible and available to HSBC U.S.A.

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1 THE COURT: Are you seeking just customer records or
2 something beyond it here?

3 MS. CALLAND: I think that what we are seeking are
4 documents that would be available to the customer. So, in
5 particular, we are seeking bank loan documentation.

6 THE COURT: For what customers? Have you identified
7 the customers?

8 MS. CALLAND: We have identified the customers. We
9 have identified the particular customers and identifying
10 information about the customers to help HSBC know who it is
11 that we are talking about.

12 THE COURT: Are you seeking any records that are not
13 properly described as customer records?

14 MS. CALLAND: I don't believe so. I think these are
15 all records that would be the customer records. So the
16 underlying bank loan documents, the collateral that was
17 provided for the loans and the loan documents themselves.

18 THE COURT: Have you subpoenaed the customers?

19 MS. CALLAND: Yes. So, the -- in the underlying
20 bankruptcy case, we have made extensive efforts to obtain the
21 documents from the liquidators of Manley Toys Limited. That's
22 the customer that we are talking about. That's the debtor. We
23 have made extensive efforts to obtain the documents from the
24 liquidators. And the liquidators, what they say is that they
25 don't have the documents. The bankruptcy court has ordered the

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1 liquidators to produce what they have.

2 THE COURT: If the liquidators, meaning the people who
3 stand in the shoes of Manley, have access through HSBC to their
4 worldwide records, why can't you simply go to the bankruptcy
5 court and say you are being sold a bill of goods, these people
6 have an account at HSBC, its customer-facing system allows them
7 as a customer to access their own records. Let's look behind
8 the label here.

9 MS. CALLAND: I believe that the accounts have been
10 closed.

11 THE COURT: Closed or open, if I have a bank account
12 at Citibank and I close the account, I can still get my
13 records. I still was a former customer and I am entitled to my
14 records from my tenure there.

15 MS. CALLAND: Yes, and the liquidators actually have
16 requested the documents from HSBC U.S.A.'s affiliates in Hong
17 Kong, but they have refused to turn over the documents without
18 the consent of all borrowers on the loans. So they have sought
19 the documents both from the people who used to control Manley
20 and from the banks and say that they have not been able to get
21 them.

22 THE COURT: I'm sorry. I am not following this. In
23 other words, you are saying that Manley has a right to its own
24 records, but Manley is refusing in bankruptcy court to produce
25 its own records because those records implicate the interests

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1 or transactions with borrowers.

2 MS. CALLAND: Not exactly. I'm sorry. I don't think
3 I was clear. The liquidators who stand in the shoes of Manley,
4 they have made requests of the people who used to control
5 Manley and have Manley's documents to ask for the bank loan
6 documents.

7 THE COURT: Right.

8 MS. CALLAND: They have not gotten them that way.

9 The liquidators also have gone to the banks to ask for
10 the documents, and the banks have refused to turn them over.
11 Because what we believe is that the bank loans in issue are not
12 just -- Manley is not the only borrower on those loans. There
13 are Manley affiliates who are also borrowers on those loans.
14 That's what we believe. We don't have the documents.

15 THE COURT: Wait a minute. The liquidators stand in
16 Manley's shoes.

17 MS. CALLAND: Yes.

18 THE COURT: You have gone to the liquidators and said,
19 Get us Manley's documents. The liquidators sound like they are
20 trying, but that when they go to the bank, the bank is saying,
21 in effect, because these same documents of Manley's also
22 implicate the interests of Manley affiliates who are not part
23 of the bankruptcy, it is not as simple as all that. There are
24 confidentiality or other interests of nonparties implicated.

25 MS. CALLAND: Yes, essentially. I don't think that

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1 they have elaborated as to their reasons but...

2 THE COURT: So if that's the case, why isn't this just
3 an end run around that? In other words, if in fact there are
4 interests implicated of those nonparties, why isn't the right
5 answer for you and the liquidators to litigate that point to
6 conclusion rather than saying, We don't care about your claims
7 of third-party interests, we are just going to get the
8 documents by going in Part I against HSBC? In other words, it
9 seems to me that the banks may have a point in that proceeding
10 that there are third-party interests that need to be taken into
11 account. I can't evaluate whether that's right or not. But
12 you have actually made some progress isolating that as the
13 stumbling block. Why isn't the answer to keep trying to get
14 that court or its higher court to agree with you on that point
15 rather than effectively starting a different proceeding here
16 claiming that HSBC can go and get materials held by an HSBC
17 affiliate and end running, if you will, these objections that
18 have been made that you have not overcome in that other
19 proceeding?

20 MS. CALLAND: So the liquidators have told us that
21 they are not inclined to litigate the issue in Hong Kong, and
22 our position is that we shouldn't have to go to the burden and
23 expense of litigating it in Hong Kong when HSBC U.S.A. has
24 control over the documents and we haven't heard from HSBC
25 U.S.A. any of these objections about confidentiality.

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1 THE COURT: So, in other words, your point is,
2 supposing you get past this -- supposing I ruled for that you
3 HSBC had practical access, HSBC could then at that point
4 interpose more specific objections relating to the interests of
5 the third parties.

6 MS. CALLAND: Yes, if they haven't waived those
7 objections, sure.

8 THE COURT: Thank you.

9 Let me hear briefly from HSBC. That is Mr. Smith?

10 MR. SMITH: Yes, your Honor. Thank you, your Honor.

11 Your Honor, HSBC Bank U.S.A. just litigated a nearly
12 identical motion in the District of New Jersey where this
13 underlying proceeding is currently pending, and there the
14 federal judge found --

15 THE COURT: Magistrate judge?

16 MR. SMITH: Yes, Magistrate Judge Hammer found that
17 HSBC Bank U.S.A. did not have possession, custody, or control
18 over customer documents of its Hong Kong affiliate. So, just
19 like in this case, we have confirmed in this hearing this
20 morning that all this concerns is customer documents and the
21 affiliate, again, is a Hong Kong affiliate.

22 THE COURT: Is that literally the same proceeding
23 that -- did the magistrate judge's ruling arise out of the same
24 lawsuit?

25 MR. SMITH: It arose out of -- that was a securities

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1 case where a subpoena was issued, but it was a motion to
2 compel.

3 THE COURT: I am going to deal with this fresh. I am
4 going to make my own call.

5 But tell me, focus on the customer-facing point. If I
6 am a customer in New York, but I have got accounts at HSBC
7 affiliates around the world, just factually is it correct that
8 I can access them from HSBC in New York?

9 MR. SMITH: You cannot. What HSBC Bank U.S.A. can do
10 for its customers is facilitate that customer's access to
11 accounts that that customer may have with foreign affiliates.
12 So it is a facilitation role. It does not provide HSBC Bank
13 U.S.A. with access to account records for foreign affiliates
14 and, likewise, it does not provide the foreign affiliate with
15 the ability to access HSBC Bank U.S.A. customer records.

16 THE COURT: So if I were to march into HSBC in New
17 York right now and give truth serum to everyone who worked
18 there and say, Can you get Engelmayer's bank records from the
19 Hong Kong affiliate and they had to answer truthfully, you are
20 telling me they would all say we literally -- there is nothing
21 we can, do beyond making a -- importuning, beyond making a
22 request, there is nothing we can do on our own steam to access
23 those records. Is that correct?

24 MR. SMITH: What the record shows is they can help you
25 facilitate your own access to your affiliates, your

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1 relationship with an overseas affiliate, but they cannot
2 themselves go in and say, We are going to pull up on our screen
3 separate databases, separate systems. They cannot go in and
4 access your records from the New York operation.

5 THE COURT: So having run this to ground, you are
6 representing to me that the people in HSBC U.S. literally
7 cannot, without securing the voluntary consent of HSBC
8 employees at the affiliates, access banking records of those
9 affiliates.

10 MR. SMITH: That's correct. And, your Honor, it is
11 declarations that we have put in the record that make the
12 statement and indicate the limitations, the separate databases,
13 the separate systems.

14 THE COURT: But I take it, as a practical matter, what
15 the marketing materials are indicating is that HSBC not in the
16 business of making life difficult for its customers or you
17 wouldn't have too many of them. As a practical matter, if I am
18 an HSBC customer in New York and I have got money in Asia and
19 every other territory on the Risk board, you are going to be
20 able to accommodate my request to gain access to that.

21 MR. SMITH: We can help facilitate your interaction
22 with that foreign affiliate so that you can access your own
23 records. But, again, you would be leaving -- if you are doing
24 anything online, you have got to leave HSBC Bank U.S.A.'s
25 network, Web site, and then you would have to go and access the

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1 foreign affiliate's. So, again, it is facilitating the
2 interaction. It is not giving the personnel in the U.S., their
3 employees of Bank U.S.A., access to or the ability to look at
4 those underlying foreign affiliates' records.

5 THE COURT: Tell me how the DPA came about.

6 MR. SMITH: The?

7 THE COURT: Deferred prosecution agreement.

8 MR. SMITH: The circumstances?

9 THE COURT: Yes. What is that investigation about?

10 MR. SMITH: The heart of the DPA concerns money
11 laundering issues.

12 THE COURT: Can you represent to me what the
13 circumstances were under which HSBC effectively commits to get
14 documents that go beyond those held just by HSBC U.S. to the
15 Department of Justice?

16 MR. SMITH: When you look at the documents -- and the
17 DPA is part of the record in this case -- HSBC Bank U.S.A. is a
18 party to it, but the other party to the deferred prosecution
19 agreement is HSBC Holdings PLC. That is the ultimate parent
20 company of all of the HSBC entities. You will see, just from
21 the text of the agreement, we are a party to the DPA and
22 counsel, in reply, pointed to paragraph 24 of the DPA, and I
23 will just quickly read this:

24 "To the extent that HSBC Holdings PLC's" --

25 THE COURT: Slow down.

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1 MR. SMITH: Sorry, your Honor.

2 -- "compliance with this agreement requires that
3 HSBC Holdings PLC agrees to ensure that its wholly owned
4 subsidiaries, and any successors and assigns, comply with the
5 requirements and obligations set forth in this agreement to the
6 full extent permissible under locally applicable laws and
7 regulations and the instructions of the local regulatory
8 agencies."

9 THE COURT: That may mean, then, that the parent
10 either on its own has the authority to compel compliance by the
11 subs or has received their consent such that contractually the
12 subs are bound, in the event that the DOJ requests, to fork
13 over that information.

14 MR. SMITH: Correct, your Honor. And the law
15 recognizes that there are instances when you are talking about
16 control, when you look at the parent looking at information
17 from a subsidiary, it looks at an instance where you could seek
18 control in those circumstance on occasion. But we do not have
19 that here. We have Holdings PLC is not before your Honor. It
20 is just HSBC Bank U.S.A. that is before your Honor. That is a
21 United States banking association. And what they are seeking
22 is documents from a foreign affiliate bank in Hong Kong. So
23 they are looking at this DPA and what went on there, and we
24 agree that it really has nothing to do -- this is a completely
25 different scenario.

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1 THE COURT: Supposing we had the same facts here
2 except that the HSBC entity that had been the subject of this
3 Part I motion was the parent, same result? You seem to be
4 saying that the parent may have an access right that the U.S.
5 HSBC entity does not have.

6 MR. SMITH: That has not been fully fleshed out on
7 this record, but I can tell you on the law and based on what's
8 been cited, the legal analysis is going to look at things
9 differently. Because they do, when you have the parent in
10 front of the court, as opposed to just a sister affiliated
11 company, it is viewed differently.

12 But we would still maintain, your Honor, in this case
13 this deferred prosecution agreement has absolutely nothing to
14 do with the party in civil litigation trying to force a U.S.
15 based entity to obtain documents over in Hong Kong. They
16 haven't cited any cases where a deferred prosecution agreement
17 has been used like this. We cited to your Honor an instance
18 where a litigant tried to use a deferred prosecution agreement
19 to establish personal jurisdiction over holdings in the United
20 States, and the bankruptcy court in that case, federal
21 bankruptcy judge, called the application and argument
22 frivolous. So there has really been no --

23 THE COURT: Does the DPA -- supposing the DOJ, under
24 the DPA, asked you for documents that had nothing to do with
25 money laundering but had to do with something else altogether,

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1 different time span. Let's call it private banking tax evasive
2 bank account, some other ostensible violation of law, but
3 something outside the scope of the investigation that led to
4 the money laundering DPA. Would the DPA even apply? In other
5 words, is the commitment there any documents or is it only
6 documents effectively arising out of the investigation and
7 prosecution that catalyzed the DPA?

8 MR. SMITH: There is an obligation to cooperate. And
9 I would refer to the terms of the agreement, and the specific
10 language will define the scope. But there is an obligation on
11 the part of the parties to the agreement to continue to
12 cooperate, and they would do that.

13 THE COURT: So the DPA is not limited just to money
14 laundering related documents.

15 MR. SMITH: I would really have to look more closely
16 specifically at the language in the cooperation aspect.
17 Certainly whatever falls within the rubric of the agreement,
18 that's what the entities would certainly do.

19 THE COURT: I thought your main argument on the DPA
20 ultimately was that the DPA doesn't reflect a practical ability
21 by HSBC U.S. to get documents in the ordinary course. It
22 reflects, frankly, the unique circumstance of a criminal
23 investigation and the coercive pressures and incentives
24 generated thereby that might have incited the other aspects of
25 the HSBC universe to sign on.

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1 MR. SMITH: That is correct. We agree. And that's a
2 view that we are talking about fundamentally different
3 situations, and we agree with that.

4 The additional point that we raised in the papers and
5 I have raised here is that the DPA has got to be viewed in the
6 context of having the ultimate parent company also as a party
7 also with obligations to provide information, and that's
8 different than the situation before your Honor.

9 THE COURT: All right. Thank you.

10 Ms. Calland, I am prepared to rule, but if there is
11 something further you want to say in rebuttal, I will certainly
12 give you a brief opportunity.

13 MS. CALLAND: Yes, please, your Honor.

14 I will start with the DPA.

15 The question under Second Circuit law is not whether
16 the affiliate wants to cooperate in a particular case or
17 whether it has an incentive to cooperate in a particular case.
18 It is cooperation in any case suffices, cooperation in any
19 litigation, which is what the DPA proves, that in fact HSBC
20 U.S.A. has the practical ability to obtain documents in
21 response to a request from its foreign affiliates and it did
22 so. Not only it produced 9 million pages of documents,
23 specifically HSBC U.S.A. -- that's what it says in the DPA --
24 it also produced HSBC Group employees from around the world for
25 interviews as well.

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1 I will also add that there are no declarations or
2 evidence in the record about the DPA. They didn't address that
3 at all in their declarations.

4 In addition, the law in the Second Circuit is that it
5 doesn't matter whether it is a parent affiliate or sister
6 affiliate that's involved; the law is the same. That's clear
7 in the case law. The test is the same. That's why there is a
8 practical ability to obtain documents.

9 With respect to the HSBC U.S.A. promotional materials,
10 we have been talking a lot about this linkage of accounts
11 internationally, but it is more than that that's talked about
12 by HSBC U.S.A. There is also the fact that they have portable
13 HSBC credit histories that can be transferred to and from all
14 HSBC locations.

15 THE COURT: What do you do when we have got squared
16 declarations that say, We can't, here in the U.S., access the
17 foreign account records? It is a Sherman-like statement that
18 is being made in these declarations, and you have got marketing
19 materials that don't squarely refute it. What can you point to
20 that says that's a lie?

21 MS. CALLAND: So I don't think --

22 THE COURT: You are saying it is a lie.

23 MS. CALLAND: Well, I am not saying that it is a lie,
24 that sort of a banker sitting in a HSBC U.S.A. branch in
25 Manhattan can't go on his or her computer and access the Hong

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1 Kong records. But that's not the issue. The issue is not
2 direct access. The issue is whether they have the practical
3 ability to obtain the documents. So that doesn't speak to
4 whether or not the HSBC U.S.A. legal department can give a call
5 to its Hong Kong counterparts to get the documents or, for that
6 matter, whether the banker sitting in Manhattan can call up his
7 counterparts in Hong Kong and request and obtain the documents
8 that way.

9 THE COURT: Right. But, look, we do recognize the
10 distinctions between corporate affiliates. Just because an
11 affiliate may choose to be cooperative or collaborative under
12 some circumstances doesn't mean that the requesting affiliate
13 is always going to prevail.

14 MS. CALLAND: That's true. But the question is
15 whether there is a practical ability to obtain documents in the
16 ordinary course of business. So if, in the ordinary course of
17 business, a lawyer or a banker at HSBC U.S.A. can obtain the
18 documents from its affiliate, that's enough to establish
19 control under Second Circuit law.

20 THE COURT: Thank you. One moment.

21 (Pause)

22 THE COURT: I'm about to read a brief bench opinion
23 resolving the pending motion. I will not be issuing a written
24 decision on this point. Rather, a simple bottom-line order
25 will issue that recites the bottom line today. So if anything

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1 that I say, if any aspect of the analysis here is of importance
2 to you, you will need to order the transcript.

3 Before the court, sitting in Part I, is a motion by
4 ASI, Inc., which I will refer to as "ASI." ASI moves to compel
5 nonparty respondent HSBC Bank U.S.A., N.A., the United States
6 arm of HSBC, which I will refer to here as "HSBC," to comply
7 with a subpoena duces tecum. That subpoena was issued June 17,
8 2016. It arises out of a matter pending in United States
9 Bankruptcy Court for the District of New Jersey, In re: Manley
10 Toys Limited, No. 1:16-bk-15374 (JNP) (Bankr. D.N.J.). With the
11 subpoena, ASI seeks account information from two HSBC
12 affiliates in Hong Kong. These are (1) the Hong Kong and
13 Shanghai Banking Corporation Limited, which I will refer to as
14 "HSBC HK," and (2) Hang Seng Bank Limited, which I will refer
15 to as "Hang Seng Bank." ASI seeks loan documents, payment
16 information, and information about collateral backing loans
17 that HSBC and its affiliates extended to Manley Toys Limited.
18 In addition to the proceeding in the District of New Jersey,
19 Manley Toys Limited is currently also undergoing a bankruptcy
20 proceeding -- or a so-called liquidation proceeding -- in Hong
21 Kong. ASI represents that the documents that it seeks are
22 relevant to, and for use in, the bankruptcy proceeding in the
23 District of New Jersey.

24 Opposing the motion, HSBC represents that, as for
25 itself, it has no responsive documents. And it argues, while

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1 the documents sought by ASI may be held by its affiliates, they
2 are not within HSBC's "possession, custody, or control" within
3 the meaning of Federal Rule of Civil Procedure
4 45(a)(1)(A)(iii). Therefore, HSBC asserts, it is in compliance
5 with the subpoena. Independent of this argument on which HSBC
6 principally relies, HSBC argues that ASI must first seek the
7 documents from the debtor in the underlying bankruptcy
8 proceeding; and that ASI should pursue other means for
9 obtaining the discovery.

10 The court turns first to HSBC's argument to the effect
11 that the subpoenaed documents are not in its "possession,
12 custody, or control" under Rule 45. If HSBC is correct on this
13 point, the analysis ends, and the court must deny ASI's motion
14 to compel without considering HSBC's alternative arguments.

15 The court first reviews the governing legal
16 principles.

17 Rule 45 permits a party to command, via subpoena, the
18 production of documents that are in the "possession, custody,
19 or control" of a nonparty, citing Fed.R.Civ.P.45(a)(1)(A)(iii).
20 The documents do not need to be in the physical possession of
21 the nonparty from whom discovery is sought. See SEC v. Credit
22 Bancorp, Ltd., 194 F.R.D. 469, 471 (S.D.N.Y. 2000). Rather,
23 "control" is construed broadly so as to permit discovery from a
24 nonparty with the "legal right, authority, or practical ability
25 to obtain the material sought upon demand." Id. To be sure,

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1 as the Second Circuit has held, a party is not required to
2 produce, at risk of sanctions, documents that it does not
3 possess or cannot obtain, citing *Shcherbakovskiy* -- spelled the
4 usual way -- v. *Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d
5 Cir. 2007). But the circuit has held, "If a party has access
6 and the practical ability to possess documents not available to
7 the party seeking them, production may be required." *Id.* As
8 various courts have held, this test governs in the situation
9 here -- when discovery is sought from one corporation about
10 materials that are in the physical possession of another,
11 affiliated corporation. See, e.g., *Dietrich v. Bauer*, No.
12 95 Civ. 7051(RWS), 2000 WL 1171132, at *3 (S.D.N.Y. Aug. 16,
13 2000).

14 The burden is on the party seeking discovery to make a
15 showing that the other party has control over the matters
16 sought, citing *Credit Bancorp*, 194 F.R.D. at 472. Therefore,
17 when the discovery is sought from an entity for documents that
18 are in the physical possession of another affiliated entity,
19 then it is the discovering party's burden, i.e., here ASI's, to
20 show that the requested entity has either the legal right or
21 the practical ability to obtain the documents in question from
22 their custodian. Citing *In re Nortel Networks Corp. Sec.*
23 *Litig.*, No. 01 Civ. 1855(RMB) (MHD), 2004 WL 2149111, at *2
24 (S.D.N.Y. Sept. 23, 2004).

25 Applying these principles to ASI's claim that HSBC has

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1 control over the subpoenaed documents within the meaning of
2 Rule 45, ASI relies exclusively on the claim that HSBC has the
3 practical ability to obtain the documents. ASI has not claimed
4 that HSBC has the legal right to obtain the discovery from the
5 Hong Kong HSBC entities. As such, the court confines its
6 analysis to whether, based upon the present record, HSBC has
7 the "practical ability" to obtain the documents in the custody
8 of its affiliates.

9 ASI makes two distinct arguments to this effect.

10 First, it argues that HSBC's promotional materials,
11 such as those it uses for marketing and advertising, reveal
12 that HSBC can obtain information from foreign affiliates
13 because those materials advertise HSBC's ability to provide its
14 customers with global access to their accounts across its
15 affiliates.

16 In considering this claim, the court is mindful that,
17 under the case law, the inquiry whether an entity has the
18 "practical ability" to obtain documents from another entity
19 turns on several factors. These include the relationship
20 between the targeted entity and the custodian of the documents;
21 the manner in which the custodian has handled the documents at
22 issue and similar categories of documents in the ordinary
23 course of business; and any business or other interests that
24 may impact the willingness of the custodian to share the
25 documents with the subpoenaed entity in the current

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1 circumstances. See, e.g., *In re Nortel*, 2004 WL 2149111, at
2 *3.

3 Applying these standards to the present record, ASI
4 has not shown that there is an arrangement or mechanism that
5 gives respondent, meaning HSBC, the practical ability to access
6 documents controlled by HSBC foreign affiliates. See *In re*
7 *Vitamin C Antitrust Litig.*, No. 06 MD 1738 (BMC), 2012 WL
8 5879140, at *8 (E.D.N.Y. Nov. 21, 2012). ASI has not shown that
9 HSBC has access to these sorts of documents in the ordinary
10 course of business, see *Credit Bancorp*, 194 F.R.D. at 472, or
11 that these documents flow freely among the entities, see *Hunter*
12 *Douglas, Inc., v. Comfortex Corp.*, No. 8 Misc. 85 (WHP), 1999 WL
13 14007, at *3 (S.D.N.Y. Jan. 11, 1999). Instead, ASI seizes on
14 statements HSBC makes in marketing that the HSBC entities share
15 information and promise customers a global banking experience,
16 such as, for example, that HSBC customers can access their
17 worldwide HSBC deposit accounts with a single log on, citing
18 Reply at 5; and the Calland Declaration, Exhibit A, at page 4,
19 or that an HSBC banking customer can "seamlessly transfer your
20 HSBC credit history to an HSBC branch" in another country,
21 citing the Calland Declaration, Exhibit A, at page 3.

22 These statements, however, reference a wholly
23 different context involving a customer's practical ability to
24 gain access to its own records across the HSBC universe. HSBC,
25 however, has flatly represented that, for itself, it lacks the

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1 practical ability to obtain these documents. It explains that
2 the systems that permit a seamless customer experience do not
3 similarly permit one affiliate to transfer information from
4 another in the manner that ASI's appears to imagine. Citing
5 Arlow Declaration at 3. As HSBC explains, its systems are
6 "customer facing" and HSBC's employees do not have access to
7 them. Citing the Braithwaite Declaration at 2. The systems
8 that permit portable credit history and international
9 relocation services for "premier" HSBC customers do not permit
10 employees of HSBC to access the account information of a
11 customer who banks with a foreign affiliate and they do not
12 permit a foreign affiliate to access the customer or account
13 information of HSBC U.S.'s customers. Id. ASI has no factual
14 counter to these credible representations.

15 Significantly, too, HSBC, the respondent here, is not
16 a branch of any foreign HSBC Bank or entity. It is a domestic
17 and wholly separate entity. In contrast, HSBC HK and Hang Seng
18 Bank, the entities which purportedly have immediate custody of
19 the documents, are incorporated and headquartered in Hong Kong.
20 Citing Arlow Declaration at 3. HSBC represents that it cannot
21 access records held by such foreign affiliates and that it
22 maintains its own computer systems and databases that are
23 separate from any systems or databases of the Hong Kong
24 affiliates. It further represents that if HSBC were to request
25 this information, the foreign affiliate would not provide it to

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1 HSBC. Id. at 3-4. These declarations are not factually
2 controverted. On the present record, whatever integration
3 customers might experience, as suggested by HSBC's marketing
4 materials, it does not follow that a domestic HSBC entity has
5 the practical ability to access information held by a
6 different, and foreign-sited, HSBC affiliate.

7 ASI's second argument with respect to HSBC's
8 ostensible practical ability to access such information is
9 based on a deferred prosecution agreement, or "DPA," that HSBC
10 and various affiliates entered into with the United States
11 Department of Justice. The DPA obliges HSBC entities to
12 provide the Department of Justice with documents from
13 throughout the HSBC family of entities. Because HSBC must,
14 under the DPA, obtain documents from other affiliates when the
15 Department of Justice so requests, ASI argues that it must have
16 the practical ability to obtain them for ASI. See Reply at
17 2-7. ASI also argues that because the DPA commits HSBC and its
18 parent company to provide any information held in the
19 possession, custody, or control of any HSBC affiliate, wherever
20 located, to the Department of Justice, it follows that HSBC has
21 the practical ability to obtain these documents from the Hong
22 Kong entities.

23 This argument is quite unpersuasive. In the context
24 of entering into a DPA to resolve a criminal investigation and
25 avoid a criminal prosecution, HSBC and its affiliates, within

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1 the broad HSBC empire, made certain commitments to the
2 Department of Justice. By their terms, however, these
3 commitments do not run to the benefit of private parties such
4 as ASI. Indeed, the fact that a DPA was apparently necessary
5 to secure the Department of Justice's ability to access from
6 HSBC documents held within the worldwide HSBC universe may
7 negatively imply that HSBC otherwise had the ability on its own
8 to reach and access documents held by foreign affiliates. It
9 may or may not be that a foreign affiliate would similarly
10 agree on its own to produce documents to HSBC in response to a
11 private party's request, but the DPA does not, at all, signify
12 that, absent such voluntary consent by the affiliate, HSBC
13 itself could access documents in the affiliate's custody.

14 Significantly, too, the terms of the DPA do not avail
15 ASI. The DPA, reproduced at Sugimura Declaration, Exhibit H,
16 does not, in paragraph 6(b), for example, say anything that
17 suggests that HSBC henceforth would have access as a general
18 matter to affiliates' records. It does not specify particular
19 ways in which HSBC entities are to share information in
20 response to a Department of Justice demand. Nor does it
21 provide that particular systems must be created to streamline
22 or enable such access. The DPA merely commits the various HSBC
23 entities as effectively part of the consent-decree-like
24 contract, to comply with a Department of Justice request, and
25 it applies only in the context of a DOJ request made "in

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1 connection with the investigation or prosecution of any current
2 or former officers, directors, employees, agents, or
3 consultants." See DPA, paragraph 6(b). This is not such a
4 case.

5 The situation here is a far cry from that in SEC v.
6 Strauss, No. 09 Civ. 4150, 2009 WL 3459204, at *7-8 (S.D.N.Y.
7 Oct. 28, 2009). The court there found practical ability
8 sufficient for control where the SEC had obtained remote access
9 to a company's database through an investigative subpoena and
10 had, via an arrangement with the company, complete and
11 immediate access to the database via an Internet portal such
12 that a motion to compel the SEC to produce the company's
13 documents could have been enforced, id. at *8, although in the
14 particular case it was not. In contrast, here, there is
15 nothing in the record to indicate that the Department of
16 Justice has required such access for itself or otherwise
17 required that similar systems be put in place to comply with
18 the DPA. Rather, the HSBC entities, in what appears to be a
19 singular context, have agreed to comply with Department of
20 Justice requests. That agreement does not sweep beyond its
21 specific contexts. ASI's reliance on it does not show, and
22 indeed HSBC flatly denies, that the Hong Kong entities, if
23 asked to relinquish the subpoenaed documents by HSBC, would do
24 so. Arlow Declaration at 3-4.

25 For the foregoing reasons, the court denies ASI's

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1 motion to compel. The court emphasizes, however, that this
2 decision is a product of the present record. The court's
3 denial of relief to ASI does not preclude ASI, if it is able to
4 build a more convincing record, to seek such enforcement of a
5 similar subpoena. The court does not, and has no basis to,
6 opine on whether there are facts that, if properly established,
7 would enable ASI to make the required showing. Nor does the
8 court have occasion to opine on whether a subpoena directed,
9 not at HSBC U.S.A., but at HSBC's ultimate parent would be
10 analyzed differently or whether such an ultimate parent would
11 have access to foreign affiliate documents.

12 Therein ends the ruling.

13 Is there anything further from the plaintiff?

14 MS. CALLAND: No, your Honor.

15 THE COURT: Anything further from the defense?

16 MR. SMITH: No, your Honor.

17 THE COURT: We stand adjourned. Thank you, counsel.

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